

ABSTRACTS

[Editor's note: The abstracts section is a new feature of the *Journal*. It contains summaries of recent articles, comments and notes discussing alternative forms of dispute resolution published in law journals not specializing in ADR. In addition, the section lists citations to recent articles of interest that are not summarized.]

Donald A. Burkhardt & Frederic K. Conover III, *The Ethical Duty to Consider Alternatives to Litigation*, 19 COLO. LAW 249-52 (1990). This article considers the unstated, unspoken ethical duty of lawyers to consider non-litigation methods of solving the problems of clients. The authors believe that the foundation of this duty lies in the competent, independent representation of clients. The authors also blame the emphasis on the traditional adversarial approach to dispute resolution for the dysfunctionality of the system. The authors argue that despite the current minimal use of ADR, an attorney's failure to consider all available means of dispute resolution may be a violation, although unknowing, of the ethical duty to competently and zealously represent their clients' interests.

The authors refer to the Colorado Code of Professional Responsibility and charge that a careful reading of all relevant disciplinary rules (DR's) and ethical considerations (EC's) establishes the duty to consider dispute resolution alternatives. In citing the duty to exercise independent professional judgment from Canon 5, the authors specifically point to DR 5-101(A), the rule prohibiting acceptance of employment, against the attorney's professional judgment, because of a financial, business, property or personal interest. The authors believe that an attorney who chooses a litigation alternative because of its potentially greater fee generation, when the benefits to the client may be limited or outweighed by the expense of litigation, may violate this DR. The authors also cite Canon 6 which requires competent representation, and its definition of competence, which includes an implied willingness to acquire knowledge of alternative dispute resolution. The authors view failure to acquire such knowledge as a DR violation. Under Canon 7, which requires zealous representation, the authors see vigorous advocacy as more than pursuit of litigation. They believe that Canon 7 acknowledges the lawyer's role as an advisor and is actually a rule of informed consent, so that zealous representation means vigorous representation plus full advocacy of all relevant considerations of the lawful means of solving the client's problems.

Finally, the authors interpret Canon 8, the call for lawyers to improve the legal system, as making it incumbent upon lawyers to develop and employ dispute resolution alternatives to alleviate some of the strains of litigation. The authors also cite the Model Rules of Professional Conduct as reflecting an advancement toward a broader definition of the lawyer's responsibility for promoting and participating in alternative dispute resolution.

Although the authors find little case law that has enforced the ethical duty, they cite several instances in which courts have issued rulings that suggest this duty. Finally, they suggest that although the duty seems obvious, it has not been adequately performed; consequently, explicit rules mandating the ethical duty to consider alternatives to litigation are necessary.

Comment, *Compelled Participation in Innovative Proceedings*, 84 NW. U.L. REV. 290-320 (1990). Federal Rule of Civil Procedure 16 provides the judiciary with discretion to encourage settlement. To resolve disputes, the Rule authorizes the use of extrajudicial procedures, including compelling the attendance of attorneys for the parties and any unrepresented parties at a pretrial conference.

The author discusses the extent of judicial discretion to compel participation in pretrial procedures. The author first discusses judicial authority to compel participation in summary jury trials, and examines the leading cases establishing the limits of such authority in the context of Rule 16. He specifically addresses the effectiveness of summary jury trials as a means of settlement.

The author next examines judicial authority to require the presence of represented parties at pretrial settlement conferences. Although Rule 16 does not expressly provide this authority, many judges argue that because the Federal Rules do not prohibit a mandatory attendance requirement, such authority exists under the judges' inherent power to manage the litigation process.

The author then discusses the arguments both for and against compelled participation at pretrial proceedings. He argues that summary jury trials and mandatory attendance at settlement conferences clarify the issues of a dispute and highlight the costs of the process to the litigants, thereby encouraging efficient dispute resolution. However, he states that a broad interpretation of the Federal Rules, providing judges with almost unlimited discretion, undermines uniformity and confidence in the federal court system.

The author advocates that judges authoritatively interpret the Rules while establishing limits to prevent the misuse of these pretrial

procedures. In doing so, he sets forth the dual objectives of recognizing pretrial innovation, while protecting the rights of litigants.

Comment, *Commercial Arbitration Between American and Japanese Businesses*, 39 U. KAN. L. REV. 223-43 (1990). The author's stated purpose in writing this article is to provide the American businessperson and lawyer with insight into the Japanese view of commercial arbitration. To achieve this purpose, the author analyzes Japanese arbitration philosophy, Japanese arbitration law, and arbitration procedure under the Japan Commercial Arbitration Association (JCAA).

The author points to five factors as being responsible for the Japanese aversion to litigation: the notion of personal relationships between parties being placed over legal rights; a desire to settle through conciliation; suppression of individual rights; the principle of consensual corporate decision-making; and governmental discouragement of litigation. It is argued that the American who comes into contact with a Japanese businessperson must have an understanding of these concepts or face conflict. Ideally, the author suggests, American business should embrace this spirit.

The author next analyzes the system of Japanese arbitration law in terms of three phases: pre-arbitration, actual arbitration, and post-arbitration considerations. In addition, the author provides a discussion of the New York Convention and the Treaty of Friendship, Commerce and Navigation -- the relevant international convention and bilateral treaties that govern United States-Japanese arbitration agreements.

Further, the author gives an analysis of the JCAA. This organization, modeled after the American Arbitration Association, is designed to promote international transactions through avoidance of disputes. It is argued that this association is fueled by the anti-litigation philosophy of the Japanese.

The author concludes that both sides need to make concessions when drafting an agreement to adopt a consensual arbitration process. The author points out that although both sides would prefer that the arbitrators selected be of their own citizenship, the location of the arbitration site be their own country, and that their native law control, there must be a willingness to compromise if United States-Japanese business relations are to be governed by an equitable arbitration clause.

Michael L. Taviss, *Adventures in Arbitration: The Appealability Amendment to the Federal Arbitration Act*, 59 U. CIN. L. REV. 559-85 (1990). This article begins by explaining how the fundamental issue of arbitrability has recently undergone dramatic change. The author

describes how the federal appellate courts have denied jurisdiction over arbitrability appeals the past sixty years. Recently, however, Congress passed the Federal Arbitration Act (FAA), which granted appellate court access for arbitrability determinations. Section 15 of the Act specifically controls the appellate courts' handling of either party's appeal in an arbitrability dispute. The author argues that although section 15 promotes a consistent federal approach favoring arbitration, various alternatives to this section are possible. Despite the success of section 15, the author asserts that parties may use these other techniques to circumvent this section. He describes how the language of the FAA permits a broad class of immediate appeals under the final decision rule. Moreover, other statutes granting appellate jurisdiction may be considered as possible appellate bases. Lastly, the author explains how the interaction of federal and state courts offer feasible alternatives to section 15. He concludes that, notwithstanding its benefits, section 15 will not directly achieve either substantial savings or increased appellate efficiency. He finally suggests that Congress rethink some of its legislative objectives with respect to arbitration before enacting any other statutes intended to assist in the arbitration process.

Note, Agreements to Arbitrate Claims Under the Age Discrimination in Employment Act, 104 HARV. L. REV. 568-87 (1990). This article encourages arbitration of claims under the Age Discrimination in Employment Act of 1967 (ADEA). The author notes that the United States Supreme Court recently extended the Federal Arbitration Act's (FAA) enforcement function to agreements to arbitrate statutory claims, which undermines its earlier contention that FAA enforcement of agreements to arbitrate was limited to contractual rights cases. The author argues that, with this recent approval of arbitration, the Court should uphold agreements to arbitrate ADEA claims. The author states that procedural and substantive arguments that relate to ADEA enforcement and to its anti-discrimination function, namely the Equal Employment Opportunity Commission's rule in bringing lawsuits, discourage arbitration and do not justify refusal to enforce agreements to arbitrate ADEA claims. The author distinguishes Supreme Court decisions denying enforcement of agreements to arbitrate employee claims arising under a variety of statutes from ADEA claims. He distinguishes those decisions denying enforcement of agreements to arbitrate because they involved either ambiguous statutory language regarding arbitration or union agreements to arbitrate that precluded individual relief in the courts, not individual agreements to arbitrate. The author reviews the positive and negative aspects of arbitrating ADEA claims and concludes with recommendations that Congress authorize Equal Employment Opportunity

Commission regulations on ADEA arbitration and that arbitrators be given more authority.

Thomas J. Quinn, Mark Rosenbaum, & Donald S. McPherson, *Grievance Mediation and Grievance Negotiation Skills: Building Collaborative Relationships*, 41 LABOR L.J. 762-72 (1990). Various grievance mediation projects have greatly improved labor-management relationships by achieving enhanced levels of success and satisfaction in negotiating grievance settlements. This result is because of a new approach in the goals and content of grievance process training programs: the traditional narrow focus on advocacy skills should be expanded to include the development of skills in problem-solving and positive attitudes toward collaboration. In contrast with the former grievance procedures that emphasized a purely adversarial approach, the new programs encourage a "mutual gains approach" to negotiation skills in the grievance training curriculum. This article notes that this new orientation enables the parties to discuss and resolve "unspoken" related issues in addition to the grievance dispute in question. A resolution of these hidden causes of dissatisfaction prevents a deterioration in the parties' relationship. The authors discuss such a program implemented by the Pennsylvania Bureau of Mediation that provides services tailored to the needs and desires of the parties according to the types of grievances involved. Bureau mediators reported that grievance mediation strengthens the parties' reliance upon negotiation and problem-solving, which in turn facilitates the settlement of other work-related problems. The authors emphasize that the Bureau does not consider grievance mediation to be a substitute for arbitration; rather, it sees it as a response to the parties' need to reach mutually satisfactory solutions to grievances before reaching the arbitration stage.

Note, *Multiparty Disputes and Consolidated Arbitrations: An Oxymoron or the Solution to a Continuing Dilemma?* 22 CASE W. RES. J. INT'L L. 341-373 (1990). A significant challenge to the legal profession is presented by multiparty disputes. To make these disputes more manageable, some states have considered requiring parties to submit to consolidated arbitration proceedings. These consolidated actions involve a single hearing at which parties with similar types of claims appear before the same panel of arbitrators. Accordingly, they are likely to result in more efficient proceedings and more uniform awards. Nevertheless, the author argues that compulsory consolidation is not a desirable solution since it is inconsistent with the goals of the arbitral process.

The author begins his discussion by contrasting arbitration with consolidation. While arbitration is chosen by the parties, consolidation is imposed by the state. In this way, the consolidated proceeding may alter the original provisions of the arbitration clause in ways not bargained for by the parties. Compulsory consolidated arbitration is then examined in specific jurisdictional contexts, including those within and outside of the United States. This examination reveals that at the federal level, there is a split among the circuits with respect to the power of courts to order consolidated arbitrations without the express consent of the parties. At the state level, Massachusetts and California have amended their arbitration statutes to allow for court-ordered consolidation. Outside of the United States, only Hong Kong and the Netherlands permit compulsory consolidation. The author concludes by questioning whether there are acceptable alternatives to compulsory consolidation. He proposes that the parties should explicitly decide at the time of contracting whether or not to permit consolidation. This would clearly establish the parties' intentions and eliminate the need for court-ordered consolidation.

Irving R. Kaufman, *Reform of a System in Crisis: Alternative Dispute Resolution in the Federal Courts*, 59 FORDHAM L. REV. 1-38 (1990). This article addresses the use of alternative dispute resolution (ADR) as a method of relieving the problems of cost and delay in the federal court system. Kaufman describes four judicial ADR mechanisms that could alleviate such problems. The first mechanism is the Civil Appeals Management Plan (CAMP). CAMP is a system of court-sponsored mediation for appellate litigation. The second mechanism is the early neutral evaluation (ENE) program. ENE is a pre-discovery, pre-trial, non-binding case evaluation by a neutral attorney. Third, is the summary jury trial (SJT). The SJT is a shortened presentation of each side's case to an advisory jury whose non-binding decision is a predictor of how a real jury would decide the case. The fourth mechanism is court-annexed arbitration (CAA). CAA is an involuntary assignment of a filed suit to mandatory, non-binding arbitration before local attorneys. The author claims that all four ADR mechanisms are effective and notes that CAA is the most effective of the four in creating early settlements. The author then turns his attention to the problems and complaints associated with the mechanisms. He examines whether ADR in federal courts actually saves time and money, whether it satisfies the constitutional right of access to the courts and the right to a jury trial, and whether it is fair. The author concludes that ADR mechanisms in federal courts do save time and money, are constitutional, and are fair. Finally, the author identifies some significant questions that still remain: What is the authority for federal courts to exercise ADR mechanisms? What happens

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to privileged information? Will the press have access? Kaufman concludes by proposing measures that would allow a more widespread use of ADR mechanisms in federal courts.

